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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Commission's Regulations Governing Television Broadcasting	)	MM Docket No. 91-221
	)	
Television Satellite Stations Review of Policy and Rules	)	MM Docket No. 87-8

REPLY COMMENTS OF CBS INC.

Howard F. Jaeckel
Richard H. Altabef
51 West 52nd Street
New York, New York 10019

Mark W. Johnson
1634 I Street, N.W.
Washington, D.C. 20006

Its Attorneys

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SUMMARY

Most comments filed in response to the Further Notice advocate the repeal or substantial relaxation, on an equal basis for all broadcasters, of those ownership rules which the commenters address. The Network Affiliated Stations Alliance ("NASA"), however, urges that the national rules' 25% coverage cap be retained for the express purpose of inhibiting the growth of station groups owned by network companies, on the theory that increased station ownership by these companies "would increase network power to thwart local programming decisions." According to NASA, the affiliate-network relationship depends on the "collective bargaining power" of all separately-owned affiliates. NASA asserts that an increase in the number of network-owned stations would diminish affiliate power to obtain fair compensation and to resist network entreaties to clear network programs.

CBS submits that NASA's argument is illogical on its face. The terms on which a network and any one of its affiliates do business turn on the relative value of each to the other -- values that are determined by market conditions in the particular DMA in which the affiliated station is located. The crucial variables in this equation are the strength of the relationship that the station and the network have each been able to establish with that market's viewers; the value to the network of exposing its programs in that particular market; and the alternatives available in that local market both to the station as a purchaser of programming and to the network as a seller of a programming service. These are the variables that drive both compensation and clearance patterns, since most preemptions by affiliates of network programs are economically motivated. It is in the mutual interest of a network and its affiliate for the affiliate to build a strong relationship to its community, but only a small fraction of preemptions serve that end. In recent years, the

three original networks have experienced repeated failures at maintaining a critical mass of clearances to support established network time periods, much less new ones.

The repeal of the national rules would have no impact on the market conditions affecting the capacity of any given affiliate to negotiate compensation payments or withhold clearances. Each station will obtain programming in a local programming market consisting of a roster of suppliers identical to the one that exists today -- networks seeking affiliates, and the host of syndicators that seek to win a place for their programs on the station's schedule. There is every indication that local programming markets are highly unconcentrated and becoming more so all the time. Stations have achieved dramatically increased leverage vis-a-vis networks as the number of networks seeking affiliates has risen from three established networks to four established and two emerging networks, and the availability of successful syndicated programming has mushroomed. Thus, even if repeal of the national rule could somehow affect concentration among sellers in local programming markets, those markets are far too unconcentrated, and far too competitive, on their supply side to justify any structural rule.

The National Association of Black Owned Broadcasters has expressed the concern that repeal or liberalization of the ownership rules might have the effect of reducing opportunities for station ownership by minority-group members as a result of increased station prices brought on by the rule change. CBS submits that the artificial depression of station values through outmoded structural regulations is clearly is an inappropriate strategy for achieving the laudable goal of increasing minority ownership of broadcast properties. Imposing pointless inefficiencies on broadcast television stations may put some of those properties in financial distress, but they will not reduce the actual costs of building and running such stations.

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REPLY COMMENTS OF CBS INC.

CBS Inc. ("CBS") respectfully submits these reply comments in the above proceeding, in which the Commission has proposed to repeal or substantially relax three of its rules governing ownership of broadcast television stations.

In its initial comments, CBS argued that any market for information and entertainment that is economically competitive is perforce intellectually competitive. We also urged that where an intellectual market would be genuinely diverse without government intervention, a policy of maximizing ownership diversity for its own sake imperils fundamental First Amendment interests -- i.e., that structural regulations which restrain the growth of broadcasting companies beyond limits required by the antitrust laws have the potential to suppress the vigor of a free press. Based on well-settled principles of competition analysis, therefore, we examined each of the economic markets in which broadcast television stations participate, relying on a detailed study of these markets submitted in this proceeding by Economists Incorporated.[1] That study's findings demonstrate unambiguously that competition policy furnishes no sound economic reason for retaining in any form the Commission's national multiple ownership rules[2] or the radio-television cross-ownership ("one-to-a-market") rule,[3] or for retaining the local ownership ("duopoly") rule[4] in its current form. They also make clear that improved operating efficiencies and increased capital support of broadcast entities would likely result from repeal or relaxation of these rules. Accordingly, CBS urged the Commission to repeal the national multiple ownership rules and the radio-television cross-ownership rule in their entirety, and to modify the duopoly rule to prohibit co-ownership of television stations only where their Grade A contours overlap or only where they are located in the same Dominant Market Area ("DMA").[5] We also recommended that the duopoly rule be changed to permit co-ownership of television stations within the same DMA where a showing is made that such co-ownership would be in the public interest.

Most of the comments filed in response to the Further Notice of Proposal Rulemaking ("Further Notice") advocate the repeal or substantial relaxation, on an equal basis for all

[1] An Economic Analysis of the Broadcast Television National Ownership, Local Ownership and Radio Cross-Ownership Rules, Economists Incorporated (May 17, 1995) ("Joint Economic Study"). The Joint Economic Study was commissioned by Capital Cities/ABC, Inc. ("ABC"), CBS, National Broadcasting Co., Inc. ("NBC") and Westinghouse Broadcasting Company ("Westinghouse").

[2] 47 C.F.R. §73.3555(e).

[3] 47 C.F.R. §73.3555(c).

[4] 47 C.F.R. §73.3555(b).

[5] CBS's proposal would permit common ownership of television stations without overlapping Grade B contours even when located in the same DMA.

broadcasters, of those ownership rules which the commenters address. The parties opposed to the proposed rule changes generally rely on familiar arguments which were anticipated in CBS's initial comments and in the Joint Economic Study, and which, we believe, require no further discussion. Accordingly, we confine these Reply Comments to consideration of only two specific issues, raised by other commenters, which CBS has not previously addressed in this proceeding.

A. The Argument That Increased Ownership Of Stations In Some Markets Would Help Networks To Win Program Clearances And Other Concessions From Affiliated Stations In Other Markets Is Without Basis In Fact Or Logic.

Most of the comments filed by television station licensees which discuss the national ownership rules call for abolition of the rules' 12-station cap, and at least some liberalization of the 25 percent limitation on aggregate national audience reach.[6] The Network Affiliated Stations Alliance ("NASA"),[7] however, argues that the 25 percent coverage cap should be retained for the express purpose of inhibiting the growth of station groups owned by network companies.[8] In

[6] See Comments of Capital Cities/ABC, Inc.; Ellis Communications; Cedar Rapids Television Company; Fox Television Stations, Inc.; National Broadcasting Co., Inc.; New World Communications Group Incorporated; Tribune Broadcasting Company; Westinghouse Broadcasting Company; WYDO-TV; Young Broadcasting; and the Association of Independent Television Stations, Inc., MM Docket No. 91-221 (each filed May 17, 1995).

[7] NASA represents the ABC Television Affiliates Association, the CBS Affiliates Association and the NBC Affiliates Association.

[8] Comments of the Network Affiliation Stations Alliance, MM Docket No. 91-221 (filed May 17, 1995) ("NASA Comments"). Six other station licensees, while not necessarily advocating retention of the coverage cap at the 25 percent level, express at least some of the concern voiced in the NASA Comments to the effect that greater station ownership by a network company might alter the relationship between a network and its affiliates. See Comments of AFLAC Broadcast Group, Inc.; Cedar Rapids Television Company; Lee Enterprises, Inc.; Post-Newsweek Stations, Inc.; Pulitzer Broadcasting Company; and Television Operators Caucus, Inc., MM Docket No. 91-221

particular, NASA asserts that changing the national ownership rules to permit a network company to extend the national audience reach of its owned stations beyond 25 percent "would increase network power to thwart local programming decisions [i.e., preemptions of network programming] because separately-owned affiliates will lose much of their leverage in affiliate negotiations."[9] This prediction rests on NASA's theory that there exists a balance of power between networks and their affiliates which "depends in part on the collective bargaining power of all separately-owned affiliates."[10] According to the NASA Comments, "any meaningful increase in the number of network-owned stations is likely to tip the balance decisively in favor of the networks," because "as the audience reach of the network-owned stations increases...networks need independent-minded affiliates less and less."[11] The result, NASA maintains, is that "separately-owned affiliates will have less power to demand fair compensation"[12] and to resist network entreaties to clear network programs[13], which NASA characterizes as a threatened "reduc[tion in] localism."[14] NASA offers no economic analysis or data in support of this theory.

On its face, there is no logic to an argument which postulates that a network which had achieved through its owned stations, say, 50 percent coverage of the national audience, could

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(each filed May 17, 1995). Because this position is most fully discussed in the NASA Comments, we focus on those comments here.

[9] NASA Comments at i.

[10] Id at 7.

[11] Ibid.

[12] Id. at 8.

[13] Ibid.

[14] Id. at 2.

afford to be indifferent to the companies that control its access to the other half -- or that ownership of stations in some markets could help a network win clearances or reduce its compensation payments in others. In fact, the value to a network of any particular station's clearance of its network programs is a function of the value to that network of penetrating the individual market in which the station is located. This value is unaffected by clearances in other markets, whether by affiliated or owned stations.

It is certainly true that each network consults with its affiliate board on its programming plans and other matters of mutual interest. The fact remains, however, that the terms on which a network and any one of its affiliates do business turn on the relative value of each to the other -- values that are determined by market conditions in the particular DMA in which the affiliated station is located. The crucial variables in this equation are the strength of the relationship that the station and the network have each been able to establish with that market's viewers; the value to the network of exposing its programs in that particular market; and the alternatives available in that local market both to the station as a purchaser of programming and to the network as a seller of a programming service. Any network's two-hundred affiliation agreements may have many standard terms, but they will also have crucial terms -- money terms -- that vary sharply from affiliate to affiliate, and as to which the number or reach of the stations owned by the network elsewhere having no bearing.

Clearance patterns similarly vary significantly from affiliate to affiliate. Networks, of course, generally seek to maximize clearances for their programs. This is not an evil impulse. The capacity of advertising revenue alone to support expensive first-run television programming is primarily a function of the size of the audience to which that programming is exposed. Preemptions significantly impair the value of network programs to advertisers.[15] This is not to say that all preemptions are undesirable, even from a network's point of view. The network/affiliate relationship is very much a partnership, and it is in the interest of both partners for an affiliated station to be an inextricable part of its community. Many preemptions serve that end, such as those which enable an affiliate to cover important local news events and other events of great community interest. Indeed, CBS's owned stations themselves preempt network programming for special local programming of this kind.

The preponderance of affiliate preemptions, however, have nothing to do with local news or community events. During the last broadcast season, only 8.1 percent of network prime time preemptions by CBS affiliates were attributable to coverage of local news and public affairs. For all NASA's talk of "localism," the fact, simple and incontrovertible, is that most affiliate preemptions are purely economically motivated, and consist of the substitution for network offerings of lower quality programming, solely to enable the affiliate to sell all commercial availabilities in the time period for its own account while receiving the benefit of "audience flows" from network programming immediately preceding it. Through compensation payments and

[15] Since advertising campaigns are often linked to particular events and promotions, advertisers value the fact that network programs, and the commercial messages they carry, are transmitted simultaneously to audiences within virtually every geographic market within the United States. Preemptions thus reduce not only the size of the audience exposure being purchased by the advertiser, but also the extra value of full simultaneous network exposure.

There is almost no way that a network can capture the value of its program in the geographic market in which it has been preempted. It is generally extremely difficult to place a single series, much less a single program, on an alternate station when the affiliate has rejected that program. Even if such alternative placement is possible, the program will be deprived of essential promotional support generally provided in other parts of the network schedule.

endless exhortations to affiliates to consider their own interest in the network's overall health, networks discourage opportunistic preemptions as best they can. Nonetheless, opportunistic preemptions occur. Their frequency, however, varies markedly among affiliates, and is very much affected by the same local market variables that affect compensation rates.

Similarly, when a network proposes to add a time period to its schedule, it must seek clearances for that time period's programming in enough markets to make the programming economically viable. Whether a particular affiliate will be inclined to grant the network the clearance that is sought is again a reflection of the relationship between the network and the individual affiliate, reflecting local market forces. In recent years, the three original networks have experienced repeated failures at maintaining a critical mass of clearances to support established network time periods, much less new ones. Inroads by syndicated programs into network clearances have caused these networks to withdraw from large portions of the broadcast day. Between 1977 and 1994, the three original networks reduced their aggregate weekly offering to affiliated stations of non-prime time programs from 212.5 hours to 187.5.[16] In September 1993, for example, CBS ceased supplying network programming to its affiliates between 10 and 11 AM due to a decline in clearances to 49% from 90% for the 10-10:30 AM portion of that hour, and to 61% from 84% for the 10:30-11:00 segment. A similar problem of non-clearance caused the CBS Television Network to abandon the 4-4:30 PM time period in September 1986. It was not a "collective bargaining" process that caused these attenuations of the network schedule, but rather a station-by-station shift from network to syndicated programming in the affected time periods.

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[16] An Economic Analysis of the Prime Time Access Rule, Economists Incorporated (March 7, 1995) at 91, submitted in MM Docket No. 94-123 (rel. Oct. 25, 1994).

The repeal of the national ownership rules could and would have no impact on the market conditions affecting the ability of any given affiliate to negotiate compensation payments or withhold clearances, no matter how many stations a network may own in other markets. Whatever the audience coverage a network achieves through owned stations, it will still value each local market in which it does not own a station in proportion to the economic importance of that particular market.

The markets in which stations seek to obtain local exhibition rights for video programs, whether network or syndicated, are local markets. Concentration on the supply side of these local markets cannot be increased by repeal of the national ownership rules. Each station will obtain programming in a local programming market from a roster of suppliers identical to that which exists today -- networks seeking affiliates, and the host of syndicators that seek to win a place for their programs on the station's schedule. Indeed, repeal of the national ownership rules may cause the supply side of these markets to become even less concentrated then they are now if larger station groups form and emerge as new syndicators of in-house produced programming.

Moreover, there is every indication that local programming markets are highly unconcentrated, and becoming more so all the time. This is particularly evident in the new leverage that stations have achieved vis-a-vis networks as the number of networks seeking affiliates has grown from three established networks to four established and two emerging networks, and the availability of successful syndicated programming has mushroomed. Network affiliates today have far more than a nominal choice in selecting individual programs and alternative network partners.[17] Thus even if repeal of the national rule could somehow affect concentration among sellers in local programming markets, those markets are far too unconcentrated, and far too competitive, on their supply side to justify any structural rule.

It is also important to distinguish between the extent of competition in markets and the individual bargaining positions of particular parties. Even if ownership of stations in some markets could help a network bargain for clearances and other concessions in other markets, that result would be devoid of regulatory significance, since it would relate solely to the division of profits between networks and their affiliates. There is plainly no basis for the government to maintain otherwise pointless and inefficient structural regulations, not to prevent anticompetitive behavior, but to protect affiliates' ability to maximize advertising revenues. The point is, in any case, irrelevant, as it presupposes that the national ownership rules have something to do with network clearances by independently owned affiliates, which they plainly do not.

In its 1984 decision to relax and, in six years, "sunset" the national ownership rules on an equal basis for all broadcasters, the Commission reviewed a variety of arguments for placing special ownership restraint on television network companies. The Commission rejected them all, finding that

> "the case for repeal of the rule has been made, and ... the case for treating the networks differently has not been made. There has been no demonstration that the benefits we perceive from increasing group ownership will be adversely affected by allowing networks to increase their station ownership. Equally, we have not been convinced of the alleged

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[17] The series of affiliation realignments precipitated by one transaction alone, the agreement announced in May 1994 between Fox Television Stations and New World Communications Group to form new station affiliations and other joint operations, will reportedly cause the three original networks to increase their affiliate compensation payments by over $200 million. "CBS's Tony Malara: In the Storm of the Eye," Broadcasting & Cable, December 19, 1994 at 31, 34.

dangers of increased network ownership. In short, we have no basis for imposing additional restraints upon the networks."[18]

We submit that no greater basis exists now than in 1984 for limiting ownership of stations by network companies.

B. The Ownership Rules Do Not Serve The Goal Of Increased Minority Ownership.

In its comments, the National Association of Black Owned Broadcasters has expressed concern that repeal or liberalization of the ownership rules might reduce opportunities for station ownership by members of minority groups as a result of increased station prices brought on by the rule change.[19] CBS submits that the artificial depression of station values through outmoded structural regulation is clearly an inappropriate strategy for achieving the laudable goal of increasing minority ownership of broadcast properties. Imposing pointless inefficiencies on broadcast television stations may put some of those properties in financial distress, but will not reduce the actual costs of building and running such stations. In any case, it cannot be sound public policy for the Commission to maintain ownership rules for the very purpose of diminishing efficiency and thus station values.

In its 1984 decision to liberalize and "sunset" the national ownership rules for television and radio, the Commission carefully considered the argument raised again in this proceeding regarding the relationship between minority ownership and station prices. In rejecting that

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[18] Report and Order, Amendment of Commission's Rules Relating to Multiple Ownership, 100 FCC 2d 17, 54 (1984) ("Multiple Ownership").

[19] Comments of the National Association of Black Owned Broadcasters, MM Docket No. 91-221 (filed May 17, 1995).

argument, the Commission stated,

> "some commenters' primary objection to changes in the rule is bottomed on...the suggestion that...a general rise [in station prices] would make it difficult for minorities to purchase stations....We must note that the Seven Station rule was not intended as a mechanism for artificially deflating the prices of stations. Indeed...the record persuades us that if station trading prices increase it will be because the new group-owned stations can operate more efficiently. And such increases in station prices would be commensurate with the benefit to the general public. These findings place a heavy burden on those commenters seeking to use the rule as a mechanism for deflating station prices by impeding the achievement of business efficiencies and thereby promote minority ownership. We do not believe they have met that burden. ...It would be inappropriate for the Commission to retain or adopt rules in order to deflate market prices artificially so as to assist any particular group."[20]

We urge the Commission to reaffirm here the impropriety of the use of ownership rules to depress station prices for any purpose.

[20] Multiple Ownership, supra, 100 FCC 2d at 48-49.

CONCLUSION

For the reasons set forth above and discussed at length in our initial comments, we urge the Commission to repeal or liberalize the broadcast television ownership rules on an equal basis for all broadcasters.

Respectfully submitted,

CBS Inc.

By ______________________
Howard F. Jaeckel

____
Richard H. Altabef

51 West 52nd Street
New York, New York 10019

By ______________________
Mark W. Johnson

1634 I Street, N.W.
Washington, D.C. 20006

Its Attorneys

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